

Part B - Attachment 4

Summary of Comments and Responses for the Retrospective Review of Administrative Regulations Adopted, Amended or Repealed since January 6, 1999

Public comments on ARB's rulemaking review conducted pursuant to EO S-2-03 were due on January 30, 2004. The EO directed agencies to conduct a retrospective review of all regulations adopted, amended or repealed since January 6, 1999. In its request for public comments regarding this retrospective review, ARB specified that this review would encompass regulations that are final (have completed the Office of Administrative Law process and are filed with the Secretary of State). For regulations approved by the ARB governing board, but not yet final, other opportunities for comment were identified. Therefore, this report does not encompass these active rulemakings and anticipated rulemakings.

Active rulemakings fall into two subgroups:

- 1) Active rulemakings nearing filing with the Secretary of State when the EO was issued. ARB has received exemptions from EO S-2-03 for these regulations from the Department of Finance (the exemptions are dated December 10 and 11, 2003).
- 2) Active rulemakings that were recently heard by ARB's governing board or had not yet been heard by the Board when EO S-2-03 was issued. For those rulemakings with open public comment periods, the comments received as part of this retrospective review will be responded to in the Final Statement of Reasons for these rulemakings. For rulemakings whose comment periods are currently closed, ARB requests that the commentators resubmit the comments when the rulemakings are reopened for comments on modifications to the rulemaking (15-day comment period).

These active regulations are in concert with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent.

Anticipated rulemakings are those that were not noticed for rulemaking as of January 30, 2004. These rulemakings are being developed in consideration of the criteria set forth for all future rulemakings in EO S-2-03. Additionally, for anticipated regulations that flow from the settlement agreement on the Coalition for Clean Air's lawsuit on the South Coast AQMD's lawsuit, the regulations have received an exemption from the Department of Finance in a December 10, 2003 letter to Chairman Alan Lloyd. All of these regulations are in concert with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent.

Public Comments and ARB Responses

The following is a summary of the comments ARB received (in the order that they were received) and ARB's response to those comments. We have identified active and anticipated rulemakings that are not a part of this review where applicable.

Comment #1 from Joe Gershen of LA BioFuel:

Comment and ARB Response: *Commented on the Verification Procedures for Diesel Emission Control Strategies. This is an active rulemaking and is therefore not part of this review.*

Comment #2 from Geri Duncan Jones of American Health and Beauty Aids Institute:

Comment: *ARB's plans for future consumer products regulations could hurt the performance and effectiveness of products that California consumers of ethnic products expect. Future rules could also take away formulation options or ban certain product forms, and would exact a high cost on small businesses while resulting in little environmental benefit.*

ARB Response: ARB plans to amend the existing consumer products regulation in 2004 to achieve additional emission reductions. Further amendments to the regulation are planned in future years. These plans are consistent with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent. They are also consistent with state law, which requires ARB to achieve the maximum feasible reduction in volatile organic compound (VOC) emissions from consumer products. Emission reductions from consumer products are necessary to achieve the state and federal air quality goals. Although VOC emission reductions from individual consumer products categories are sometimes small, the aggregate emission reductions from many small emission categories are cumulatively substantial.

State law specifies that all consumer product regulations adopted by the ARB must be technologically and commercially feasible, and that these regulations cannot require the elimination of any product form. Therefore, future regulations will not ban product forms as suggested. ARB takes these obligations very seriously and has worked hard to set regulatory standards that will allow products to adequately perform the job they are intended to do. In the future, ARB will continue to follow both State law and its past practice. Finally, the Administrative Procedure Act requires ARB to conduct an economic impact analysis on all proposed regulations; therefore, ARB staff will conduct an economic analysis of each consumer product regulation when it is proposed. ARB is committed to insuring that all future regulations are cost-effective and will not have a severe economic impact on small businesses.

Comment: *The Institute also commented on ARB's future consumer product regulations that are not a part of this review.*

Comment #3 from Scott Hughes of the National Biodiesel Board:

Comment and ARB Response: *Commented on the Verification Procedures for Diesel Emission Control Strategies. This is an active rulemaking and is therefore not part of this review.*

Comment #4 joint comments from Jay McKeeman of California Independent Oil Marketers Association (CIOMA) and Joe Sparano of the Western States Petroleum Association (WSPA):

Comment: *Gasoline dispensing facilities will have to upgrade their Phase II vapor recovery systems twice in the next five years as systems that meet all the enhanced Vapor recovery (EVR) Phase II requirements are not yet certified. WSPA and CIOMA request that implementation dates be revised to align the onboard refueling vapor recovery (ORVR) deadline with the other EVR Phase II requirements in order to mandate only one upgrade. WSPA and CIOMA point out that in its resolution to adopt the EVR Phase II requirements ARB's governing board requested staff to assess whether there is adequate lead time to install complying certified EVR Phase II systems prior to the deadline for complying with ORVR requirements.*

WSPA and CIOMA provided a cost analysis to show that upgrading twice increases the cost beyond ARB staff estimates. Also included was an American Petroleum Institute (API) study concluding that modifications to one currently certified Phase II vapor recovery system could eliminate the majority of the emissions attributed to ORVR compatibility.

ARB Response: *Staff is working with CIOMA, WSPA and other affected parties to address the adequacy of the lead time to install complying certified EVR Phase II systems prior to the deadline for complying with the ORVR compatibility requirements as directed by ARB's governing board in its resolution. Staff agrees that the cost-effectiveness of the EVR programs degrades if multiple upgrades of the same equipment are necessary, however, it is possible that partial upgrades could eliminate the bulk of the excess emissions due to ORVR fuellings without requiring a full system replacement.*

Comment: *CIOMA and WSPA request a review of ARB's in-station diagnostics (ISD) requirement which they view as a costly program with questionable emission reduction benefits. There is a concern that air pollution control districts will use ISD systems as an enforcement tool, rather than a device to alert the station operator of a problem.*

ARB Response: *ARB staff has directly experienced the value of ISD systems in identifying vapor recovery system failures during the certification process and maintains that ISD is cost-effective for identifying system failures at medium and high volume stations. Stations with throughputs less than 600,000 gallons/year are exempt from ISD requirements. ARB staff continues to work with CIOMA and the air pollution control districts to reach a consensus on ISD enforcement issues. ARB staff's position mirrors CIOMA's in that ISD is a tool for the operator to identify and promptly repair vapor recovery system failures that lead to excess emissions. However, ARB staff also*

supports the use of local district enforcement action if the station operator ignores ISD-detected equipment failures.

Comment #5 from Thomas J. Donegan, Jr. of the Cosmetic, Toiletry, and Fragrance Association (CTFA):

***Comment:** Midterm Measures 2 was the most recent major rulemaking completed for consumer products. The reformulation of hair shines to meet the impending deadline set by this rulemaking will be difficult and expensive, and will be borne in significant part by small businesses that must absorb the costs or pass them on to consumers. Midterm Measures 2 has proved to be a very difficult effort to achieve any significant reductions, despite the good faith efforts of ARB staff and industry.*

ARB Response: From the effective date of the Midterm Measures 2 regulation, hair shines were given nearly five years lead time to meet the regulatory standard. Hairsprays and other hair care products have already been reformulated to meet previous VOC standards, and ARB staff concluded that technology transfer can be applied to hair shines from these reformulated hair care products. The combination of this technology transfer and the long lead time should allow hair shines to be successfully reformulated.

To further insure that future limits can be achieved, the ARB staff conducts a technical assessment before each limit becomes effective. During this assessment ARB staff evaluates the manufacturers' progress in reformulating their products to meet the new VOC limit and identifies whether any problems have been encountered. ARB staff plans to do a technical assessment for the hair shine VOC limit in 2004. If significant problems are identified, then ARB staff will reevaluate the limit and modify the regulation if necessary. For example, in 1996 ARB staff worked with industry to conduct a technical assessment for the upcoming hairspray standard. ARB staff concluded that there were reformulation problems that could be overcome if additional time were provided. Therefore, ARB adopted an 18-month postponement of the effective date for hairsprays that allowed manufacturers the needed time to successfully complete the reformulation process.

Finally, ARB does not agree that it was unduly difficult to achieve any significant emission reductions from the Midterm Measures 2 effort. Significant emission reductions of 18 tons per day of VOC will be achieved when the regulation is fully implemented. Consumer product regulations are consistent with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent.

***Comment:** The amendment to the Antiperspirant and Deodorant Regulation was urgently required to correct an earlier regulation that went too far. The ARB had adopted a zero-percent HVOC (propellant) standard for antiperspirants. These products are over-the-counter drugs (non-prescription) drugs regulated by the Food and Drug Administration (FDA) and the California Department of Health Services (DHS). The industry found and ARB agreed that this reformulation was not feasible when the only*

ingredient allowed by FDA for an aerosol antiperspirant was incompatible with the only ingredient that would permit attainment of a zero-percent HVOC limit. ARB is currently considering regulation of additional over-the-counter drugs. The ARB does not have the expertise to determine whether these reformulations will adversely affect the efficacy or safety of a product and should not attempt to regulate these products. These products are minor sources of emissions and should not be regulated.

ARB Response: As described in the previous response, the ARB staff conducts a technical assessment of each new VOC limit before it becomes effective. In the case of antiperspirants, ARB staff conducted such an assessment and agreed that the future effective antiperspirant limit was not feasible due to an unanticipated chemical reaction that was a surprise to everyone, including the consumer products industry. ARB acted quickly on this information to grant variances to antiperspirant manufacturers, and then to modify the antiperspirant limit in the regulation.

This experience shows that the process works rather than that ARB should never attempt to regulate over-the-counter drugs. ARB staff is currently considering new VOC limits for some over-the-counter drugs. However, no final decision has been made and the manufacturers' concerns will be listened to and thoroughly researched as part of the regulatory development process. ARB staff will work with the California Department of Health Services, the Food and Drug Administration, public health agencies, and other medical experts to ensure that the efficacy of these products will not be compromised if they are reformulated. New VOC limits will be proposed if a technologically and commercially feasible reformulation option is identified and product efficacy will be preserved.

Comment: *At this time, the Office of Administrative Law has regulations under consideration that will, for the first time, subject certain consumer product companies to fees based on their VOC emissions in California. While we believe the law to be ill-considered, we believe it illustrates the extraordinary lengths to which ARB must go to support a huge infrastructure to regulate consumer products. We submit that this level of effort to regulate consumer products no longer makes sense and that substantial portions of these resources should be shifted to other efforts where more meaningful emission reductions can be achieved. The ARB is chasing a shrinking pool of emissions, and most products cannot be reformulated in a way that is technologically and commercially feasible.*

ARB Response: ARB is required by law to achieve the maximum feasible reductions in VOC emissions from consumer products. The regulation of consumer products is also consistent with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent. In addition, ARB staff believes that viable reformulation options exist that will allow significant additional emission reductions to be achieved from consumer products. ARB has adopted a State Implementation Plan (SIP) commitment to achieve 25-40 tons per day of VOC emission reductions from consumer products by 2010. Consumer product emissions in 2000 accounted for 8 percent of the man-made VOC emissions statewide, or 267 tons per

day. After SIP measures are implemented, 2010 VOC emissions will be between 220 and 235 tons per day, and will continue to grow as the California population grows.

Emissions from consumer products are so large that without additional controls, it would be extremely difficult or impossible to achieve the state and federal ambient air quality standards. Although VOC emission reductions from individual consumer products categories are sometimes small, the aggregate emission reductions from many small emission categories are cumulatively substantial. For all of these reasons, the ARB does not agree that resources should be directed away from the regulation of consumer products. Any future regulations considered by the ARB will, of course, be accompanied by a full technical and economic analysis to demonstrate that regulations are feasible and cost-effective.

Comment: CTFA also commented on ARB's future consumer product regulations that are not a part of this review.

Comment #6 from Jay McKeeman of California Independent Oil Marketers Association (CIOMA):

Comment: The ARB should not enter into settlement agreements like the one which resolved a 1997 lawsuit brought by environmental groups. Such agreements exclude interested and affected parties. If agreements are pursued, then all potentially affected parties should be included.

ARB Response: The settlement agreement resolved a 1997 lawsuit brought by three environmental groups against the ARB. The lawsuit alleged that the ARB was not fulfilling all of the commitments made in the 1994 California State Implementation Plan (SIP). Since the federal District Court had already ruled against the ARB in the lawsuit, the alternative to a settlement agreement would have been for the Court to order the ARB to adopt specific measures by specific dates. Given this alternative, the ARB strongly believes that entering into the agreement was in the best interests of both the public and the regulated industry, because it provides much more flexibility than the alternative -- court mandated action.

This flexibility is embodied in the specific provisions of the settlement agreement. It does not commit the Board to adopt any specific regulations by any specific dates, or to achieve any particular quantity of emission reductions from any particular measure. What the agreement does instead is commit the ARB staff to propose to the Board the adoption of certain specified regulations by specified dates. All of these proposed regulations must go through the full public process under the California Administrative Procedure Act, including a 45-day public comment period and a public hearing where input from the regulated industry can help shape the outcome. The settlement agreement does not commit the Board to adopt any of these measures as they are proposed by staff. In other words, the Board is free to adopt, reject, or modify staff's proposed regulations as the Board sees fit. This flexibility is a critical provision of the settlement agreement because it would not have been appropriate to limit the Board's

discretion by requiring that particular measures be adopted without allowing for a full public process.

Finally, it is worth mentioning that almost all of the measures listed in the settlement agreement are contained in the 2003 State and Federal Strategy for the California SIP (Statewide SIP), which was approved by the Board at a public hearing held in October 2003. Prior to the hearing, the Statewide SIP was developed during a lengthy public process which provided many opportunities for public comment on the measures contained therein. These measures are consistent with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent.

Comment: *[With regard to ARB's diesel fuel and CaRFG3 regulations] ARB staff continues to ignore the economic impact on small businesses resulting from their regulations. CIOMA suggests ARB staff improve its economic impact assessment methodologies.*

ARB Response: ARB staff's economic impact assessment of California's Phase 3 Reformulated Gasoline Regulations (CaRFG3) included an evaluation of the potential economic impacts of the regulation on small businesses. Staff's evaluation consisted of an assessment of the regulation's impact on the distribution system, fuel prices, and small business profitability. Based on this evaluation, the ARB Board concluded that the regulation would have no significant adverse impact on small businesses.

ARB appreciates CIOMA's suggestions for improved economic impact assessment. These suggestions will be considered by the ARB in its future rulemakings. ARB has always been a leader among California State agencies in assessing the economic impacts of its regulations. Since the 1970's, ARB has carried out a progressive economics research program investigating the costs and benefits of emission reductions. For example, as early as the 1970's ARB sponsored studies that investigated methodologies for assessing the economic impacts of air quality management plans.

In the early 1990's the ARB, concerned about the impacts of its regulations on the California economy, undertook several research projects to improve its economic impact methodologies. One study conducted in association with Cal/EPA, for example, developed a guide for reviewing environmental policy studies. Another study evaluated methods for estimating the impact of a proposed regulation upon jobs and businesses, especially small businesses in California. A third study assessed the impacts of regulation on business decision location.

The ARB continuously seeks assistance from consultants and university researchers to improve the analytical methods it uses to assess the economic impact of its regulations. In recent years, the ARB has acquired a number of complex mathematical models such as the Environmental Dynamic Revenue Analysis Model (E-DRAM) and the California Criteria Air Pollutant Modeling System (CalCAPMS). These models are used to assess

the overall economic impacts of major regulations and estimate the monetary value of controlling PM in California.

ARB staff will continue its efforts to enhance its economic impact assessment methodologies and data collection, especially as they relate to small businesses. CIOMA's suggestions in support of such improvements are welcome.

Comment: *ARB staff should make every effort to respond in good faith to concerns raised by affected parties during the course of regulation comment and consideration.*

ARB Response: ARB staff agrees that every effort should be made to respond in good faith to concerns raised by affected parties, and are committed to implementing this vision. ARB staff continually strives to improve their interaction with affected and interested parties, including making themselves available for individual meetings with stakeholders, frequent public consultation meetings, and recently, Internet broadcasting of public meetings.

Comment: *With regard to ARB's vapor recovery regulations, ARB has not sufficiently addressed the issues of costs to small businesses in economic analyses accompanying proposed regulations. Small businesses must take out loans to make expensive upgrades. CIOMA is concerned that the economic analyses are based on very preliminary cost estimates and evenly spread over the population of service stations, without weighting for "ability to pay." Although CIOMA has been invited to provide input to regulation cost analyses, CARB is obligated by law to specifically evaluate the impact to small business and it is not the burden of the regulated parties. CIOMA requests that CARB retain a consultant to develop economic impact models on small businesses. CIOMA also requests that economic impact analyses undergo regular updates to verify original estimates and identify thresholds of cost increases that would trigger a new hearing on the regulation.*

ARB Response: ARB staff understands the need to address costs to small businesses in vapor recovery regulations. For this reason, the economic analysis for EVR calculated costs separately for five different sizes of gasoline dispensing facilities and exempted the smallest facilities from certain requirements that were not cost-effective for those facilities. In addition, the EVR cost analysis was updated approximately two years after the original analysis was conducted. The updated analysis was based on improved cost information gleaned from the EVR technology review. With the updated analysis, the overall cost-effectiveness of the regulation increased from \$1.80/pound to \$5.24/pound, which still is not out-of-line with other ARB regulations.

The ARB has spent substantial resources and time developing appropriate regulatory financial impact analysis techniques. We believe our analyses are comprehensive and applicable to real world situations. While ARB would always welcome additional resources dedicated to our economic analysis efforts, it is unlikely given current budget constraints. Staff continues to review new information, as it becomes available, that affects the technical feasibility and cost-effectiveness of adopted regulations.

Comment: CIOMA is concerned about having sole-source vendors for certified equipment. CIOMA requests that at least three vendors/suppliers be certified before requirement timelines are established.

ARB Response: ARB Staff agrees that ideally there should be a choice of EVR certified systems and is working with manufacturers to increase the number of certified systems. A requirement that more than one system be certified before the regulations could become effective would provide an economic disincentive for vapor recovery equipment manufacturers to be the first to develop new technology based solutions, and would delay anticipated emission reductions from a large emission source category.

ARB envisioned the possibility of supply shortages and price gouging when adopting the EVR regulation. Administrative remedies in the EVR regulations allow for the use of pre-EVR systems in documented instances of supply shortages and evidence of price gouging. In the EVR Phase I system situation, the single supplier met demand and charged reasonable prices for the equipment. If EVR Phase II system availability becomes an issue, staff will consider excessive cost as a factor in determining "commercial availability." The regulation allows pre-EVR systems to be installed when no EVR systems are commercially available.

Vapor recovery regulations are consistent with the Governor's Draft Action Plan for California's Environment, which includes a goal of reducing air pollution statewide by up to 50 percent.

Comment and ARB Response: CIOMA also commented on ARB's Enhanced Vapor Recovery Regulations on Aboveground Storage Tanks, Consideration of Regulations on Cargo Tank Trucks and Fuel Delivery Practices, and Consideration of Retrofit Requirements to Fuel Delivery Truck Engines. These are anticipated rulemakings and are therefore not part of this review.

Comment #7 from Timothy A. French of the Engine Manufacturers Association:

Comment: ARB should include the Risk Reduction Plan to Reduce Particulate Matter (PM) Emissions from Diesel-Fueled Engines and Vehicles (Diesel Risk Reduction Plan) in this retrospective regulatory review.

ARB Response: The Diesel Risk Reduction Plan was a non-regulatory report outlining ARB's approach for reducing PM from diesel engines and vehicles. This report was developed through an extensive public process and presented to the Board at a public meeting in September 2000. At the Board meeting, ARB staff clarified that the detailed analyses concerning economic impacts, legal authority, and other critical issues would be addressed as each specific rule is developed. Since the Diesel Risk Reduction Plan is not a regulation, we believe it is not a part of this review. EMA will have an opportunity to comment on economic and authority issues as each regulation is developed. The Diesel Risk Reduction Plan is consistent with the Governor's Draft

Environmental Action Plan, which includes a goal of reducing air pollution statewide by up to 50 percent.

Comment and ARB Response: *Also commented on ARB's Regulatory Amendment Identifying Particulate Emissions from Diesel-fueled Engines as a Toxic Air Contaminant. This regulation was reviewed pursuant to EO S-2-03, and it was determined that the measure was adopted in accordance with the criteria expressed in EO 5-2-03, and the changes in the rule are not appropriate.*

Comment #8 from Darrel Dietz:

Comment: Mr. Dietz expresses general concern with the ARB's rule-development and adoption procedures. He believes more public notice of workshops should be provided and that ARB should record and post minutes of each workshop.

Response: ARB fully complies with the requirements of Government Code section 11346.45 with regard to providing public notice and opportunities to comment on proposed regulations. ARB notifies the affected public as widely as possible of the development of proposed regulations. The ARB provides multiple opportunities for the public to comment in one or more workshops or through informal comment periods before entering into the formal rulemaking process. The latter starts with the publication of a notice in the *California Notice Register*. The comments received during the workshops are considered and addressed during the workshops themselves to the extent possible. ARB does not always respond in writing to comments made during the workshop because the process is often interactive. Once the formal rulemaking phase is entered, all comments received during formal rulemaking are responded to as required by Government Code section 11346.9 in the final statement of reasons for the regulations.

Comment #9 from Staci Heaton of the California Trucking Association:

Comment and ARB Response: *CTA characterizes its comments as expressing "strong opposition" to the proposed 2003 CARB diesel fuel amendments. However, the thrust of the CTA comments is that ARB should do something that is not part of the proposal – repeal the aromatic hydrocarbon standards that were: 1) approved by ARB in 1988, 2) implemented in California in 1993, and 3) made part of California's federally-enforceable State Implementation Plan (SIP) for ozone in 1995. Consideration of repeal of the aromatics regulation adopted in 1988 is not a part of the review required by EO 5-2-03.*

The majority of comments received from CTA for the retrospective review for CARB diesel fuel regulations are identical to those received during the original 45-day comment period and will be responded to as 45 day comments in the Final Statement of Reasons (FSOR). The diesel fuel regulations are active rulemakings and are therefore not a part of this review.

Comment and ARB Response: *Expressed concerns regarding the Diesel retrofit procedure warranty provisions that ARB adopted in 2002. CTA made the same*

comments during the regulatory development phase of the regulation and re-submitted those comments in the current package. No new issues were raised in the current package that were not addressed by ARB during the rulemaking process.

Comment: The ARB should not enter into settlement agreements like the one which resolved a 1997 lawsuit brought by environmental groups. The ARB is using this settlement agreement to justify moving ahead with its regulatory agenda. The practice of privately settling lawsuits allows special interest groups to control ARB's regulatory agenda and leaves out the parties that will have to pay for the results.

ARB Response: Please see the response to the first comment by CIOMA.

Comment and ARB Response: CTA asserts that four proposed regulations (California-only Truck Standard, Proposed ATCM for Transport Refrigeration Units, Amendments to the Diesel Emission Control Strategy Verification Procedure, and the Heavy-duty Diesel Engine Software upgrade Regulation or "Chip Reflash") represent a last minute rush by ARB to adopt business-killing regulations that were held back by the former administration. These are proposed regulations and are therefore not a part of this review. CTA's comments will be fully considered during the ongoing rule adoption process.

Comment and ARB Response: Also commented on the Control Measure for Diesel Particulate Matter from On Road Heavy-duty Residential and Commercial Solid Waste Collection Vehicles and the Amendments to the Diesel Emission Control Strategy Verification Procedure. These are active rulemakings and are therefore not part of this review. CTA's comments will be fully considered during the ongoing rule adoption process.

Comment #10 from Thomas M. Mason:

Comment and ARB Response: Commented on biodiesel and the Verification Procedures for Diesel Emission Control Strategies. This is an active rulemaking and is therefore not part of this review. CTA's comments will be fully considered during the ongoing rule adoption process.